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## R. v. O'Brien – Declarations against Penal Interest as an Exception to the Hearsay Rule

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The development of the law of Evidence has evolved primarily by judicial decision into a system which cannot be rationally put together in a logical whole. The rules developed in myriads of cases which later judges believed bound them by virtue of the doctrine of *stare decisis*, and which also demanded that they avoid the absurdities or injustices which the simple application of these rules would produce. In their efforts to avoid this problem, judges have created refinements and exceptions to the earlier rules. In recent times the courts have even occasionally departed from previous decisions with a clear statement to this effect. Despite these innovative departures, the court can only apply a bandage to a system which needs a major operation.<sup>1</sup>

The Supreme Court of Canada, in *R. v. O'Brien*<sup>2</sup> has applied a bandage to one of the exceptions to the hearsay rule. The hearsay rule excludes evidence of statements made out of court when they are tendered for the purpose of establishing the truth of the matter stated. Ostensibly this evidence is excluded because of the lack of safeguards such as cross-examination and oath which are felt enable the court to better evaluate the veracity and accuracy of the statement. Pursuant to the haphazard development mentioned above, and premised upon the notion of circumstantial guaranties of trustworthiness, a number of exceptions to the hearsay rule were created.<sup>3</sup> One of these exceptions was that a declaration made by a person, now deceased, which was against his pecuniary or proprietary interest would be admissible.<sup>4</sup> This rule seems to be premised upon the assumption that anyone who asserts a fact which

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1. This is clearly expressed by Lord Reid in *Myers v. D.P.P.* (1964), 2 All E.R. 881 at 886:

. . . The only satisfactory solution is by legislation following on a wide survey of the whole field and I think that such a survey is overdue. A policy of make do and mend is no longer adequate.

2. (1977), 16 N.R. 270 (S.C.C.).

3. V. Wigmore, *Evidence* § 1455.

4. *The Sussex Peerage*, [1844] 8 E.R. 1034.

is clearly against his or her own interest in unlikely to be incorrect or insincere because he may be subjecting himself to civil liability. Wigmore would add to this the criteria of necessity because the declarant is dead or otherwise unavailable and there is often a dearth of other evidence.<sup>5</sup>

In the mid-nineteenth century the English House of Lords made it clear that this exception did not apply to a declaration against penal interest.<sup>6</sup> *Sussex Peerage* was followed extensively throughout Canada and the United States until recent years. On June 24, 1977 the Supreme Court of Canada announced a departure from *Sussex Peerage* stating that declarations against penal interest may now be admissible.<sup>7</sup> Martin O'Brien and Paul Jensen had been jointly charged with possession of a narcotic for the purpose of trafficking.<sup>8</sup> Jensen fled, but O'Brien was arrested and subsequently convicted of the offence.<sup>9</sup> After O'Brien's conviction, Jensen returned and told O'Brien's counsel that he had committed the crime alone and was willing to testify to this effect.<sup>10</sup> Unfortunately for O'Brien, Jensen died before a re-hearing could be held. O'Brien's counsel obtained a leave to adduce fresh evidence and he repeated the statement given by Jensen before the British Columbia Court of Appeal.<sup>11</sup> The court was persuaded by this evidence and allowed the appeal and directed an acquittal. A leave to appeal to the Supreme Court of Canada was granted on the question:

[Whether] the Court of Appeal for British Columbia erred at law in holding that hearsay evidence given before that Court by Sidney B. Simons pursuant to leave granted in accordance with section 610 of the Criminal Code would have been capable of raising a reasonable doubt in the mind of the trial judge as to the guilt of the accused.<sup>12</sup>

The full Supreme Court reversed the decision of the Court of Appeal upon the basis that the statements made by Jensen failed to fall within the exception, but stated that they would now depart from *Sussex Peerage* and include declarations against penal interest in the exception if they satisfied the criteria.<sup>13</sup>

5. *Supra*, note 3 at § 1457.

6. *Supra*, note 4.

7. *R. v. O'Brien*, *supra*, note 2.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 274.

13. *Id.*

*The Authorities Prior to O'Brien*

Wigmore maintains that early English law did not distinguish between the admissibility of declarations against proprietary, pecuniary or penal interest.<sup>14</sup> The basic exception developed as a matter of practice following the evolution of the hearsay rule.<sup>15</sup> The early courts would admit account entries of a deceased person where he had acknowledged receipt of money.<sup>16</sup> Admissions by a party in action were also developing as an exception to the hearsay rule. In the early 1800's there is some evidence that a unity of principle treating all statements of this nature as exceptions to the hearsay rule was argued for on the basis that all such statements concerned matters which were prejudicial to the declarant's own interest thus giving them circumstantial guarantees of trustworthiness.<sup>17</sup>

This unity, if it ever existed, was abruptly terminated in 1844 by the decision of the House of Lords in *Sussex Peerage*.<sup>18</sup> The plaintiff's claim was for a peerage and the resolution depended upon whether the deceased peer, father of the claimant, had been married. The Royal Marriage Act prohibited the contracting of marriages or annulment of any already contracted in violation of its provisions, whether the marriage was contracted or solemnised within or outside of England.<sup>19</sup> A now deceased clergyman had told his son that he had celebrated a marriage between the deceased peer and his alleged wife contrary to the provisions of the Royal Marriage Act, which could have subjected him to a criminal prosecution. The Court, however, refused to admit this declaration because the interest was not of a pecuniary nature, stating that the law does not recognize the apprehension of possible danger of a prosecution as creating an interest which is recognized for the purpose of admissibility.<sup>20</sup> In dismissing the argument for admissibility of this statement, the Court stated what they perceived to be the dangers inherent in such an approach:

To say if a man should confess a felony for which he would be liable to prosecution, that therefore, (the instant the grave closes over him) all that was said by him is to be taken as evidence in

14. *Supra*, note 3 at § 1476.

15. *Id.*

16. *Hingham v. Ridgway* (1908), 103 E.R. 717 (K.B.), although a later decision relied on the earlier cases to this effect.

17. *Supra*, note 14.

18. *Supra*, note 4.

19. 12 Geo. 3, c. 11.

20. *Supra*, note 4.

every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced.<sup>21</sup>

The case not only appeared to be badly argued, but it was also an unfortunate case to use as a precedent because the statement was made to a son where the apprehension of criminal prosecution would be minimal. In the final analysis, the court failed to articulate any rational policy for distinguishing between penal and pecuniary interest and merely stated the rule as:

. . . the only declaration of deceased persons receivable in evidence, are those made against the proprietary or pecuniary interests of the party making them when the subject matter of such declarations is within the peculiar knowledge of the party so making them.<sup>22</sup>

This pronouncement by the House of Lords was adhered to, at least in theory, by both Canadian and American courts in the century to follow. The oft-cited United States Supreme Court decision which adopted *Sussex Peerage* was *Donnelly v. U.S.*<sup>23</sup> Donnelly was convicted in the circuit court of the U.S. for the Northern District of California upon an indictment for murder of Chickasaw, an Indian of the Hoopa Valley Reservation. The appellant's lawyer sought to introduce the confession of Joe Dick, now deceased, and circumstantial evidence which connected him to the crime. In refusing to admit this confession, the majority cited with approval *Sussex Peerage* and other U.S. decisions where declarations against penal interest had been excluded and concluded with the adopted admonition:

The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to introduction of fresh exceptions to an old and well-established rule; the value of which is felt and acknowledged by all. If the circumstance that the eye witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained.<sup>24</sup>

Mr. Justice Holmes, supported by two other Justices, boldly refused to follow the English position and in dissent argued for a more liberal approach by the Supreme Court:

21. *Id.* at 1045.

22. *Id.*

23. [1913] 228 U.S. 243.

24. *Id.* at 277.

The rules of Evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us, the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is as much against interest as a confession of murder, it is far more calculated to convince than dying declarations which would be let in to hang a man.<sup>25</sup>

In seriously questioning the philosophical rationale for excluding declarations against penal interest, Justice Holmes seems to accept Wigmore's exhortation that it is time to "discard this barbarous doctrine" which seems calculated to create more injustices than it would otherwise warrant.<sup>26</sup> The majority made no real effort to examine the basis for the exclusion but merely accepted the doctrine as articulated by these early decisions.

Although the Supreme Court had spoken on this issue, some courts in the United States subsequently questioned or refused to follow the decision. In 1946, the California Supreme Court in *People v. Spriggs*,<sup>27</sup> following the principle that courts must develop judicially the law of evidence where the legislature is silent, held that declarations against penal interest were admissible as an exception to the hearsay rule. Justice Traynor for the court, stated that admissibility must be determined according to the principle that,

[T]he purpose of all rules of evidence is to aid in arriving at the truth, [and] if it shall appear that any rule tends rather to hinder than to facilitate this result it should be abrogated without hesitation.<sup>28</sup>

Following this, the court concluded that a declaration against penal interest was as trustworthy as one against pecuniary interest and furthermore the traditional concept of "pecuniary" interest could logically include one's penal interest. In *New York v. Brown*<sup>29</sup> the court expressed the opinion that:

The rule in New York should be modernized to hold that an admission against penal interest will be received where material and where the person making the admission is dead . . . .<sup>30</sup>

25. *Id.* at 277-278.

26. V. Wigmore, *Evidence* § 1477.

27. [1946] 60 C. 2d 868 (Calif.).

28. *Id.* at 845.

29. [1969] 26 N.Y.R. 2d 88 (N.Y.).

30. *Id.* at 94.

The Supreme Court in *U.S. v. Harris*<sup>31</sup> refused to extend this rule to warrant proceedings and pointed out the doubts that had arisen concerning the wisdom of the exclusion.

In 1973, the Supreme Court in *Chambers v. Mississippi*<sup>32</sup> held that the exclusion of testimony which indicated someone other than the accused was the murderer was a breach of the defendant's right to due process. Although the court did not specifically state declarations against penal interest would be admissible in the future, they did indicate that the evidence here was surrounded with considerable assurances of reliability and for further support they referred to the New Federal Rules of Evidence which would allow such admissions in Federal Courts.<sup>33</sup> (Here the decision had originated in a state court so the Federal Rules were not applicable.) It seems from this decision that the American judiciary are moving closer to what the drafters of the various Evidence rules have been advocating for some time.

The Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws, were approved in 1953 by the Conference and the American Bar Association.<sup>34</sup> In these rules the drafters went beyond Justice Traynor's approach in *Spriggs* and adopted Wigmore's analysis that declarations against interest should not only be expanded to include penal interest but also statements which subject the individual to a risk of becoming an object of hatred, ridicule or social disapproval since these probably mean as much to an individual as concern for his pecuniary interest.<sup>35</sup> These rules, although adopted by some states, extended the exception beyond what was entirely acceptable by the majority of lawyers in the United States.<sup>36</sup>

When the Federal Rules were initially drafted, a similar provision was placed in as an exception to the hearsay rule where the declarant was unavailable.<sup>37</sup> In the journey through Congress, the provisions

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31. [1971] 403 U.S. 573.

32. [1973] 410 U.S. 284.

33. *Id.*

34. These rules were designed with the hope that all the American states would adopt them, thus providing a uniform system of evidence among the states.

35. Uniform Rule 62(10).

36. The California Evidence Code, approved May 18, 1965, effective January 1, 1967, adopted this rule as part of the provisions concerning exceptions to the hearsay rule — Rule § 1230.

37. The Federal Rules of Evidence For United States Courts and Magistrates were approved January 2, 1975 and came into effect July 1, 1975. These rules were the

relating to public ridicule, hatred or social disapproval were abandoned. The advisory committee report gives as reasons for deletion of this category that they lacked sufficient guarantees of reliability.<sup>38</sup> Although they were willing to expand the exception to include a statement tending to expose the declarant to criminal liability and offered to exculpate the accused, they placed a limitation upon this, which reflected previously expressed concerns with fabrication, requiring "corroborating circumstances clearly indicating the trustworthiness of the statement before it could be admitted".<sup>39</sup> When the Federal Rules were adopted in 1975, the American Federal Court system began using a rule which reflects Justice Holme's arguments in *Donnelly* that there is no logical reason for differentiating between penal and pecuniary interest; in fact, penal interest likely exercises a stronger claim as an exception because of the potentially serious consequences attached to such a statement. The additional requirement of corroborating circumstances will require some clarification but it should alleviate concerns about fabrication.

### *Canadian Experience*

In Canada, courts tended to follow *Sussex Peerage*, but in recent years, as in the United States, some doubts began to appear in the judgments as to the wisdom of the distinction made in *Sussex Peerage*. In *Regina v. Agawa and Mallet*,<sup>40</sup> Martin J. A. cites criticisms of the rule but avoids a departure from it by suggesting that even if this exception extended to declarations against penal interest, the particular statement there likely would not fall within the exception, nor was the declarant dead — he had merely refused to testify. At present, Canadian Law only recognizes death as sufficient to fulfill the requirement of unavailability.

In 1977 the Supreme Court of Canada was presented with an opportunity to re-examine the admissibility of declarations against penal interest when Peter Demeter appealed against his conviction of murder in the death of his wife.<sup>41</sup> The Ontario Court of Appeal

joint product of the rule making process as evolved by the Supreme Court and the legislative process as conducted by the two houses of the Congress.

38. Advisory Committee's Notes to Rule 804(3). The Advisory Committee was appointed in March, 1965, by Chief Justice Earl Warren to formulate rules of evidence for the federal courts.

39. *Supra*, note 37, Rule 804(3).

40. (1975), 31 C.R.N.S. 293 (Ont. C.A.).

41. *R. v. Demeter* (1977), 15 N.R. 46 (S.C.C.).



had stated that it was not bound by *Sussex Peerage* but declined to settle the law because it felt the facts of this case did not warrant such an examination.<sup>42</sup> This did not, however, prevent the court from enunciating a number of criteria which would have to be met in addition to those applicable in deciding whether a declaration is against proprietary or pecuniary interest.<sup>43</sup> The Supreme Court referred to these as “a valuable guide for consideration” in the event that it should decide to depart from *Sussex Peerage*.<sup>44</sup> Without making this decision, the Supreme Court determined that the declarations in question would not even meet the initial requirements. The inference was strong, however, that given a suitable opportunity, the court would choose to depart from *Sussex Peerage*.

The court was, within a matter of months, challenged with this question in *R. v. O'Brien*,<sup>45</sup> where it stated that it would now be prepared to depart from *Sussex Peerage* and admit declarations against penal interest as an exception to the hearsay rule. Mr. Justice Dickson, speaking for the court, attacked *Sussex Peerage* by an examination of the rationale underlying the rule and concluded that the court could find no reason to distinguish between declarations against penal and pecuniary interest.<sup>46</sup> This conclusion was based upon the assumption that an individual would be as likely to speak the truth when a matter affected his liberty as when it concerned his pecuniary interest. The court also expressed the concern that such an absolute rule forbidding admission could create situations where a grave injustice may be perpetrated.<sup>47</sup> It seems that any concern about fabrication would be alleviated by reference to the criteria required for admissibility of a declaration. The criteria used by the court were those enunciated by the Ontario Court of Appeal and approved by the Supreme Court of Canada in *Demeter*.<sup>48</sup> In view of the approach adopted by the court, these

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Supra*, note 2

46. *Id.*

47. *Id.*

48. In *Demeter*, *supra*, note 41, the Supreme Court set out the additional criteria as enunciated by the Ontario Court of Appeal. These were in essence:

1. The declaration would have to be made to such a person and in such circumstances that the declarant should have apprehended a vulnerability to penal consequences as a result.
2. The vulnerability to penal consequences would have to be not remote.

criteria will likely be applied fairly stringently and it will be a rare case where a declaration exculpating an accused will be admissible under this exception.

What has this decision accomplished? It has removed the distinction between penal and pecuniary interest which had existed ostensibly because of a fear of fabrication. Although this fear may have some foundation, it is not sufficient to require absolute exclusion, particularly where criteria can be established which would protect against misleading or fabricated statements. The judge or jury should be in a position to assess the weight of any statement, and suspicion of fabrication would merely reduce the weight to be attached to it.

This case also reinforces the attitude of the court reflected in other evidence decisions such as *Ares v. Venner*,<sup>49</sup> where a willingness was expressed to amend another area of evidence law without stipulating, as Lord Reid had, that this was a proper matter for the legislature. The court was responsive in both *O'Brien* and *Ares* to a felt need for change — in one to rectify an arbitrary distinction,<sup>50</sup> and in the other to modernize an exception to reflect the realities of modern business practices.<sup>51</sup> In this instance, the court was influenced by the controversy and clamour in the United States for a recognition of the absurdity of the existing distinction.<sup>52</sup> Although the court did not refer specifically to the New Federal Rules (perhaps because it felt this was legislative action whereas the court's change had to be compatible with existing judicial principles) it seems to have followed the general principles articulated in the rules. While the Supreme Court does not mention

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3. The declaration sought to be given in evidence must be considered *in its totality*. If upon the whole tenor the weight is in favour of the declarant it is not against his interest.

4. In a doubtful case a court may properly consider whether or not there are other circumstances connecting the declarant with the crime and whether or not there is any connection between the declarant and the accused.

5. The declarant would have to be unavailable by reason of death, insanity, grave illness which prevents the giving of testimony even from a bed, or absence in a jurisdiction to which none of the processes of the Court extends.

It is unlikely the Supreme Court would wholly adopt this last criteria as later comments indicate unavailability would still be limited to the situation where the declarant is dead. This last criteria is fairly widely accepted by the U.S. courts.

49. (1970), S.C.R. 608; (1969, 70 W.W.R. 96).

50. *R. v. O'Brien*, *supra*, note 2.

51. *Ares v. Venner*, *supra*, note 49.

52. *Supra*, note 50.

corroborating circumstances, the criteria that it would use reflects the same concern and may achieve the same result. These criteria likely give the judge more guidance whereas the Federal Rules leave it to judicial discretion as to what will constitute corroborating circumstances.

Although one may laud the court for taking a progressive step forward instead of shifting the burden to the legislature, all that has been created is another refinement to an already overly-burdened haphazard system, and it does little to rationalize the system of evidence. Courts must, of necessity, in individual decisions have a narrow focus and must decide the case on principles pertinent to the particular factual situation presented. This does not permit the courts to revitalize the law of evidence and prevent it from further approaching the complexity of the Maze of the Minotaur.

It appears that Lord Reid is correct when he insists that it is the legislature's responsibility to undertake a major operation on the rules of evidence. The courts cannot be given this power — nor should they since this is not a judicial but rather a legislative function. Rather, the legislators must be in their wisdom provide an orderly framework for the judges to operate in. It is their role to take the centuries of haphazard development and reshape and mould them into a workable, efficient system designed to meet the needs of today's society.

In Canada the demand for a reform of the evidence law has been much slower than in the United States. It was not until 1975 that the Law Reform Commission of Canada published a proposed Code of Evidence, whereas the Americans have been proposing changes since the 1940's.<sup>53</sup> The resistance to the proposed code has been strenuous for many reasons — one being a simple fear of change. In the proposed Code the problems pertaining to declarations against interest would be partially eliminated by subsuming it under the general exception for statements admissible if the declarant is unavailable, and the statement would be admissible if made by a person while testifying as a witness.<sup>54</sup> This section is premised upon the assumption that if a person is unavailable, statements made by that individual may provide the best evidence.<sup>55</sup> Admissibility

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53. Law Reform Commission of Canada, *Report on Evidence*, Ottawa, Information Canada, 1975.

54. *Id.* section 29. Section 29 is an exception to the basic prohibition against hearsay articulated in Section 27.

55. *Id.*, comments pp. 70-71.

becomes the rule and probative value is then assessed by the judge or jury. Although not specifically articulated, it is likely that matters such as a lack of corroborating circumstances or danger of fabrication would be signs or indicators of the weight to be attached to the evidence instead of the criteria for determining admissibility. One of the advantages of this rule would be to dispense with the fine distinctions that have been made at common law. It is, however, highly unlikely that it would make a substantive difference because the judges are likely to look for similar criteria before finding that a statement is relevant. If this is to be the situation, it may be more advisable to articulate the key exceptions such as declarations against interest in the manner in which the Federal Rules enunciate them.<sup>56</sup> This narrows the extent of admissibility and provides more guidelines for judges and litigants to operate within, thus creating more certainty.

No matter what the ultimate resolution of the problem, it is apparent that an entire change is required to rationalize the system of evidence law and declarations against interest will be one of the integral parts which combine to create the system. For the present, the Supreme Court has clarified the situation and pointed the trend for the reformers or at least adopted the trend of earlier reformers.

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56. *Supra*, note 39.